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Justification of supranational criminal law – Analysis of collective securitization in the EU-level harmonization of money laundering provisions

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## Abstract

Tackling terrorism was the prime justification in the European Commission's proposal for the recently adopted anti-money laundering Directive 2018/1673, the first directive on money laundering focused on criminal law rather than administrative measures. We utilize the theory of collective securitization to illustrate how the EU seeks to connect the criminalization of money laundering to the fight against terrorism, requiring, for example, the extension of the criminalization of self-laundering. As an example of how the securitizing rhetoric has not convinced the Member States, we discuss the case of Finland, which is willing to extend its criminalization of self-laundering, even though the legal economy rather than protection from terrorism is considered to constitute the object of legal protection. We demonstrate that the use of terrorism-focused securitization is problematic especially in the context of criminal law, because it challenges the traditional understanding of the objects of legal protection as the basis of criminalization.

## Keywords

European Union, criminal law, money laundering, self-laundering, securitization, European integration

### 1. Introduction

This article contributes to the vivid discussion on European integration in criminal law,<sup>1</sup> a field that used to be excluded from the ‘normal’ supranational processes of European integration (that is, the former first pillar) before the Lisbon Treaty’s entry into force. The focus in this article is on the legislative process of the first EU Directive on combating money laundering by criminal law (2018/1673),<sup>2</sup> which entered into force on 2 December 2018 and which the Member States need to transpose into national legislation by 2 December 2020. We analyse the procedure from the perspective of collective securitization, demonstrating how the criminalization of money laundering is presented as one manner to prevent terrorism and what the potential implications of such securitization are.<sup>3</sup> An illustrative example of the extent of the securitization process related to the Directive is that the precedent instrument that the Directive replaces, the Council Framework Decision of 26 June 2001, did not mention terrorism at all, instead focusing only on obligating the Member States to implement the 1990 Council of Europe Convention on money laundering. The new Directive also refers to international standards determined by, for example, the Financial Action Task Force (FATF), but the main justification is derived from terrorism, as we are about to outline. As we illustrate in this article, money laundering has been linked to terrorist financing since 9/11, but EU measures so far have focused on administrative and preventive tools to combat money laundering, where this conflation seems more justifiable: the same measures that help trace the laundering of dirty money may also help tracing funds that are used for terrorist financing. However, a similar legitimization does not function with criminal law measures, as the preventive force of the criminalization of money laundering appears unlikely to deter terrorists from executing terrorist attacks.

Nevertheless, we do acknowledge that the criminalization of money laundering may enable confiscation: an offence must have been taken place in order for the authorities to confiscate the money of potential terrorists. In terms of punishment, the recent money laundering Directive only enables punishing terrorist organizations if they receive their funds from criminality and the funds flow through EU countries at some point.

However, if the money comes from lawful sources and/or does not cross the EU, EU countries are not able to confiscate the money or impose sentences. Another potentially problematic aspect of the Directive is that fundamental principles of national criminal law systems may be compromised as a result of the confusion in the objects of legal protection, as exemplified by the criminalization of so-called 'self-laundering', where the perpetrator of the predicate offence launders the dirty money themselves. In contrast to the traditional third-party money laundering, self-laundering has been criminalized in most EU countries only in the 21<sup>st</sup> century.<sup>4</sup>

The questions we seek to answer in this article are (1) to what extent the collective securitization of money laundering has been utilized to justify the introduction of criminal law in this field, and (2) to what extent such securitization may be problematic.<sup>5</sup> We start from the premise that the fact that countries have agreed to cooperate in matters pertaining to the core of national sovereignty, such as criminal law, testifies of the extensive depth of European integration in the context of securitized criminalization.<sup>6</sup> We argue that the securitization of money laundering by turning it from an ordinary offence into, additionally, an issue of national security and a contributor to terrorism has served as a legitimization rationale for the legislation but can simultaneously challenge fundamental principles of criminal justice in the EU Member States.

Even though money laundering and terrorist financing are currently conflated by all international organizations dealing with money laundering (such as FATF), the fundamentals of the two are diametrically opposed; money laundering seeks to hide the

origin of money derived from illegal sources, whilst terrorist financing primarily seeks to hide the purpose of money often (but not always) derived from lawful sources.<sup>7</sup> It has even been suggested that terrorist financing is rather a question of money dirtying rather than money laundering.<sup>8</sup> Despite this, the two issues are often tackled together as it is argued that money flows deriving from money laundering and those targeted at terrorist financing can be investigated at the same time and with similar measures.<sup>9</sup>

The Commission proposal begins with the section outlining the ‘reasons for and objectives of the proposal’, starting with the following sentence: ‘The recent terrorist attacks in the European Union and beyond, underline the need for the EU to work across all policies to prevent and fight terrorism’.<sup>10</sup> The criminal law measures against money laundering are thus justified by the fight against terrorism, but there are also issues that do not relate to terrorism, such as the criminalization of self-laundering, legitimated with the claim that it prevents ‘criminals from exploiting the differences between national legislations to their advantage’.<sup>11</sup> By way of example, we later discuss the criminalization of self-laundering in the case of Finland, where the self-laundering provision included in the Directive has been considered to present a challenge for Finland’s basic criminal law principles. This is because the objects of legal protection in money laundering are understood differently than in the Commission’s proposal, which may cause problems for the application of the legislation.

The research material used in the article consists of EU-level and national (Finnish) legal and policy documents. At the EU level, the material includes all EU legislation concerning money laundering, with a focus on the Commission directive proposal (COM(2016) 826 final) as well as documents of the Council and of the European Parliament related to the proposal, and the accepted Directive 2018/1673. At the Finnish level, the material includes all public preparatory material concerning said proposal as well as a report of a committee commissioned by the Finnish Ministry of Justice concerning the implementation of the Directive. Committee reports and statements,

along with letters from the Government to the parliament, are also taken into consideration.

We start our analysis by shortly discussing the objects of legal protection in criminalizing money laundering. After this, we present our theoretical framework and analyse the process of tackling money laundering with criminal law means in the EU, while evaluating whether collective securitization has taken place. We then describe the policy outcome of the process in Finland and discuss whether this EU-level securitization can be considered just. Finally, we conclude the article by presenting our core conclusions.

## 2. Objects of legal protection in criminalizing money laundering

There are different theories regarding what criminalization should be based on, that is, what the object of protection (or a legal good, *Rechtsgut*) that is safeguarded with criminalization is.<sup>12</sup> Some theories – especially in Anglo-Saxon legal cultures – put more emphasis on ethical principles (harm and wrongfulness) as the basis of criminalization,<sup>13</sup> whilst continental legal approaches tend to require that the objects of legal protection be grounded in explicit legal provisions such as constitutional norms and fundamental rights.<sup>14</sup> The latter means that the task of criminal law is to safeguard the objects of legal protection that have been codified in the lists of fundamental rights of different countries and in international human rights conventions.<sup>15</sup> However, money laundering is an issue of international criminal policy, where the justification seems to be derived from security rather than ethics or fundamental rights.

While trying to harmonize the criminalization of money laundering in different countries, the ‘object of legal protection’ seems to be increasingly based on fighting terrorism in addition to the international pressure to protect the financial sector, rather than on objects of legal protection derived from national constitutions or human rights conventions. In a similar vein, the first recital in the approved Directive (EU) 2018/1673 reports that ‘Money laundering and the related financing of terrorism and organised

crime remain significant problems at Union level, thus damaging the integrity, stability and reputation of the financial sector and threatening the internal market and the internal security of the Union'. A recital referring to the financial sector and internal market can also be found in previous legislative instruments of the EU on tackling money laundering, though only the ones after 9/11 mention terrorism and internal security. The objects of protection in previous anti-money laundering measures are further discussed in the coming sections.

It seems plausible that what used to be the primary justification, the protection of the financial sector, is such an abstract 'object of legal protection' that it may not convince all EU member states of the need to expand money laundering criminalization – whilst simultaneously compromising national penal and constitutional principles. Instead, the criminalization of money laundering appears to constitute a type of collectively securitized criminalization at the EU level, which seeks to address money laundering as linked to a security threat (terrorism), instead of trying to directly safeguard a specific object of legal protection derived from fundamental rights.<sup>16</sup> Even though security is obviously a fundamental right, it is equally obvious that money laundering does not directly threaten the security of EU citizens.

Whereas purely legal analyses often rely on theories of the objects of legal protection as a basis of criminalization, we want to complement this literature by utilizing a framework from constructivist International Relations studies, that is, securitization theory. This enables us to critically analyse the discursive justification of EU legislation in the fields in which security threats seem to provide a basis for criminalization.

Securitization and objects of legal protection may also lead to the same result, if it is a case of just securitization where the *actual* object of legal protection by criminalization coincides with the referent object of securitization, such as the security of the people.

The new Directive's justification is that of tackling terrorism and protecting EU citizens, but does it actually protect the internal security of the Union? It does not seem

so. We argue in this article that the use of this kind of unfounded securitization is problematic especially in the context of criminal law, because it challenges the traditional understanding of the objects of legal protection as the basis of criminalization. Justifying criminalization with security threats that are not actually the objects of legal protection may, in turn, cause problems for the basic principles of national criminal law systems, such as legal concurrence in the case of self-laundering;<sup>17</sup> for example, if we are not aware of the real objective of criminalizing self-laundering, it might be problematic to determine in what kind of situations the concurrence principles allow the courts to impose someone a sentence for self-laundering in addition to the predicate offence. Legal concurrence constitutes one of the crucial issues related to national criminal law systems that has been discussed in different countries (such as Finland, Sweden, Italy and Germany) with regard to self-laundering.<sup>18</sup>

### 3. The concepts of collective securitization and just securitization

The idea of securitization originally developed in the discourse-oriented Copenhagen School of security studies and was elaborated also in the sociological Paris School. It can be briefly recapped by citing Thierry Balzacq, who defines securitization in the following manner:

an articulated assemblage of practices whereby heuristic artefacts (metaphors, policy tools, image repertoires, analogies, stereotypes, emotions, etc.) are contextually mobilized by a securitizing actor, who works to prompt an audience to build a coherent network of implications (feelings, sensations, thoughts, and intuitions), about the critical vulnerability of a referent object, that concurs with the securitizing actor's reasons for choices and actions, by investing the referent subject with such an aura of unprecedented threatening complexion that a customized policy must be undertaken immediately to block its development.<sup>19</sup>



In the context of the EU, this may mean that the Commission (securitizing actor) aims to present money laundering as a security threat in order to convince the Member States and their citizens (audience) to adopt the proposed EU-level criminalization (customized policy). This may require compromising fundamental principles in their national criminal law system in the face of, for example, terrorism (threatening complexion) that threatens the people of the EU (referent object).

With regard to the EU, the securitization theory has recently been discussed in terms of *collective* securitization, which means that the securitizing actor and the audience are partially the same actors, the Member States.<sup>20</sup> In addition, the ontological security in the EU context can be considered to refer in some cases to the ‘protection of the collective self through its achievements (in this case, the institutional advancement of the integration process)’.<sup>21</sup> This means that securitization can take place in order to protect the integration process as such, for example by advancing European integration in further areas by means of the securitizing process. In the case of the extended criminalization of money laundering, however, further integration seems to rather constitute the customized policy with which to tackle the threat of terrorism rather than the pronounced referent object. It has been argued elsewhere that the securitization of terrorism in the EU began after 9/11,<sup>22</sup> and we can also observe similar developments in the context of money laundering, as we outline later in this contribution.

In collective securitization, there are six steps out of which the first and last stages are entitled ‘status quo security discourse and practice’.<sup>23</sup> Sperling and Webber call the second stage of securitization the precipitating event, which in this case can include both the 9/11 attacks and the subsequent terrorist attacks in Europe, reflecting a ‘culmination of a manifest trend’ in the securitization process.<sup>24</sup> After the precipitating event, the third and fourth stages include the securitizing move and the audience response, which in the case of collective securitization occur in a recursive interaction.<sup>25</sup> This means that the Commission may be the actor launching the securitization move,

but the securitization is reformulated in the legislative process between different Member States and EU organs. The fifth stage, in turn, includes the policy outputs that come out of the securitizing process. This refers to how policy is formulated in the national context, and we decided to focus on the case of Finland, where securitization does not seem to convince the legislators but where the criminalization of self-laundering is still extended. After the fifth stage, we reach another status quo security discourse and practice stage, which may serve as the starting point for another securitization process.<sup>26</sup>

We deem that the discussion on whether securitization has taken place should be complemented with an analysis of the legitimacy of such securitization. Hence, after analysing the collective securitization process in the legislative procedure, we end our discussion by examining whether such collective securitization fulfils the three criteria for just securitization outlined by Rita Floyd:

- (1) there must be an objective existential threat, which is to say a threat that endangers the survival of an actor or an order regardless of whether anyone has realized this;
- (2) the referent object of security must be morally legitimate, which is the case only when the referent object is conducive to human well-being defined as the satisfaction of human needs; and
- (3) the security response must be appropriate to the threat in question, which is to say that
  - (a) the security response must be measured in accordance with the capabilities of the aggressor and
  - (b) the securitizing actor must be sincere in his/her/its intentions.<sup>27</sup>

We discuss these criteria later on, but before, we look at the stages of collective securitization related to the Directive.

4. Stage 1: The status quo discourse concerning international money laundering – protecting society from drug trade and organized crime

Originally, money laundering constituted primarily an economic offence where the object of protection related to the prevention of narcotic sales and organized criminality. After 9/11, terrorism became the prime justification for criminalizing money laundering. This change is visible, for example, in FATF, the Financial Action Task Force, which was established in a G7 summit in 1989.<sup>28</sup> The original objective of FATF was to prevent the laundering of illegal money derived from drug trade and organized crime by requiring states, *inter alia*, to enact effective legislation against money laundering. However, fighting terrorist financing through anti-money laundering measures was also added to its mission in 2001.<sup>29</sup> We consider that the recent EU Directive 2018/1673 is also a continuation of this process kickstarted by FATF, which has sought to frame money laundering as a global threat linked to terrorism that requires uniform criminalization worldwide. The role of FATF in constructing the problem of money laundering has already been addressed in previous research.<sup>30</sup> In this EU-focused article it thus suffices to note that the role of FATF has been significant also in the case of the Directive under scrutiny, testified, for example, by the fact that FATF is mentioned 22 times in the Commission's proposal for the Directive (COM(2016) 826 final).

Linking money laundering with terrorism provides it with a more severe character, as money laundering is not only connected to traditional narcotics trade and organized crime but also to major security threats at the cross-border and national level. This expanding phenomenon of linking money laundering to security threats has been aptly summarized by Mitsilegas and Vavoula: 'anti-money laundering law will always be used in a chameleon manner, adjusted to provide ready responses to every security threat arising in the political vocabulary'.<sup>31</sup> Before the securitization process starting with 9/11, the status quo of international money laundering discourse hardly ever made a connection with terrorism. As a border-crossing crime, money laundering entered the

international discussion on criminal law only after the financial markets were liberalized in the 1980s and 1990s.<sup>32</sup>

Along with the international pressure coming from the United Nations and the Financial Action Task Force, the European Communities also reacted to the phenomenon of money laundering in the beginning of the 1990s. Money laundering was first addressed in 1991, when Council Directive 91/308/EEC obligated Member States to ensure that their financing systems could not be used for money laundering purposes.<sup>33</sup> This was the so-called first anti-money laundering (AML) Directive, and terrorism was also mentioned in the ninth recital of the directive, as it was stated that money laundering is not only related to drug offences but may relate to organized crime and terrorism. At this time, terrorism could hardly be considered the main justification for the legislation, but the object of protection stated in the first recital is the ‘soundness and stability’ of financial institutions, as ‘the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public’.

The Council of Europe has also played a large role in the international fight against money laundering. The first important document was the Strasbourg Convention: the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.<sup>34</sup> The EU obligated the Member States to implement these provisions as it adopted the Council Framework Decision on money laundering in 2001, made, according to Article 1, ‘in order to enhance action against organized crime’.<sup>35</sup>

The Framework Decision introduced the first penal commitment in money laundering and requiring that at least four years shall be the maximum punishment for aggravated money laundering. In the framework decision, no reference to terrorism was made, nor was terrorism mentioned in Directive 2001/97/EC, which introduced further preventive obligations for Member States in actions against money laundering; Recital 1 stated that the aim was ‘protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime’.<sup>36</sup>

5. Stage 2: The precipitating event of 9/11 linking money laundering to terrorism

As outlined above, we can consider 9/11 the precipitating event after which the protection from terrorism started to be used more often as justification for different types of EU measures.<sup>37</sup> Parallely, the fight against money laundering started with renewed strength after 9/11, when money laundering became associated with terrorism. The related securitization did not only take place in the EU, but also in FAFT and in the Council of Europe. In 2005, the 1990 Council of Europe Convention was further developed with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,<sup>38</sup> the so-called Warsaw Convention, which also set the foundation for the objective of harmonizing criminal law provisions in the EU Member States. The securitization of money laundering is evident when comparing the Conventions of 1990 and 2005; the 2005 Convention introduced money laundering as a means of terrorist financing in the aftermath of 9/11, whilst no connection to terrorism was made in the 1990 Convention. In the 2000s, administrative measures against money laundering were tightened also in the EU with the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing 2005/60/EC.<sup>39</sup> It is telling that the 2001 money laundering Directive did not include a single reference to terrorism, whereas the 2005 Directive mentioned the word 'terrorism' 82 times, defining it as a phenomenon that, according to Recital 1, 'shakes the very foundations of our society'. The following anti-money laundering measure was Directive 2006/70/EC,<sup>40</sup> in which all mentions of money laundering also bore references to 'terrorist financing'. Further administrative measures against money laundering to be taken by EU Member States were also provided in May 2015 with Directive (EU) 2015/849.<sup>41</sup> In this Directive too, it is suggested that the same actors that launder money also finance terrorism and that it is necessary to tackle the phenomenon at the EU level. For example, Recital 2 of the Directive provides that 'in order to facilitate their criminal activities, money launderers

and financiers of terrorism could try to take advantage of the freedom of capital movements and the freedom to supply financial services which the Union's integrated financial area entails'. In a similar vein, the latest *administrative* Directive (EU) 2018/843 states in Recital 2 that 'Recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations'.<sup>42</sup> Preventive and administrative measures are thus strongly justified with recent terrorist attacks and with the aim to prevent new ones.

The first anti-money laundering provisions focusing on criminal law measures were put forward in the above-mentioned Framework Decision of 26 June 2001, in which no reference to terrorism was made.<sup>43</sup> Instead, the Decision sought to tackle organized crime with the harmonization of certain criminal law measures. Reference to organized crime can also be considered a sort of securitization, but the threat of terrorism is obviously a more severe societal security threat than organized crime, which does not necessarily threaten the life of the public.

Framework decisions were substituted by directives with the Lisbon Treaty that entered into force in 2009 and the first directive on countering money laundering *by criminal law* was proposed by the Commission (COM(2016) 826 final) in December 2016. In contrast to the preceding Framework Decision, terrorism played a large role in the justifications, and the following section discusses the process of the securitizing move and the audience's response by illustrating the central arguments in the legislative process. Although securitization with regard to money laundering in general had taken place already previously along with the administrative measures, the new Directive had to rely on even more powerful securitization in order for the Member States to accept harmonization of the criminal law provisions.

#### 6. Stages 3 and 4: Securitizing move and audience response

As already mentioned, the Directive of the European Parliament and of the Council on countering money laundering by criminal law (2018/1673) is the first directive aiming

to tackle money laundering through common criminal law measures in the EU. The Commission proposal for the Directive (COM(2016) 826 final) starts by describing the threat of terrorism, presenting money laundering as a manner in which terrorist organizations and organized criminals receive their funding.<sup>44</sup> The need for such a directive was expressed already in the Commission's Action Plan to strengthen the fight against terrorist financing of 2 February 2016, emphasizing that a strengthened legal framework on money laundering 'contributes to tackling terrorist financing more effectively'.<sup>45</sup>

As discussed before, the Directive proposal's first justification is derived from the recent terrorist attacks in the EU.<sup>46</sup> The Directive proposal also states that the introduced measures provide 'for a strengthened legal framework to combat money laundering in the EU, improve enforcement and act as a greater deterrent to terrorist and criminal activity'. The more comprehensive and uniform criminalization of self-laundering, in turn, is justified with the argument that it prevents 'criminals from exploiting the differences between national legislations to their advantage'.<sup>47</sup> It is thus acknowledged in the proposal that self-laundering is not so much related to terrorism but to cross-border criminal activity.

In addition to extending the criminalization of self-laundering, another new measure introduced in the Directive is that, according to Article 3(4), a sentence can be imposed for money laundering even if the money originates from an act that is not considered a crime in the country where the act took place. The Directive thus allows Member States to punish a person for money laundering concerning acts that are considered an offence only in the Member State in question. However, a sentence for money laundering is *obligatory* only with regard to six acts (predicate offences) listed in Article 2(1): organized criminality, terrorism, human trafficking, sexual exploitation, drug trafficking and corruption. It is to be noted that the original proposal of the Commission did not obligate the Member States to disregard double criminality in any cases, nor was the

issue mentioned in the first compromise text in the Council. It was the European Parliament to add the notion that money laundering shall be sometimes punishable even if the predicate offence is not a crime in the country where it was committed, the formulation apparently reflecting ‘what had been previously agreed between the institutions’.<sup>48</sup> The Directive was approved at first reading, which suggests that the need for the Directive was shared by the institutions and Member States.

The new Directive thus provides that a Member State may compromise the *nulla poena sine lege* principle in cases of serious (cross-border) crime, including terrorism. In concrete, the *nulla poena sine lege* principle in this case concerns the requirement of double criminality, that is, that the act (predicate offence) should constitute an offence both in the country where it was committed and where a sentence for laundering the money derived from the offence is imposed. A similar debate on double criminality was already held after the European Arrest Warrant (EAW) was introduced in 2004, and the question was even referred to the Court of Justice of the European Union. The Court reminded that the Council had agreed that ‘the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality’.<sup>49</sup> As the Court had already confirmed in this case that it is justifiable to compromise double criminality in the case of serious crimes, the money laundering Directive may constitute a further step along this slippery slope. This example illustrates that security imperatives may be regarded as threats to public order and safety serious enough to compromise fundamental principles of the rule of law.

Another issue worthy of attention is the relation between administrative and criminal law measures. In this issue, we can look at the Commission’s report to the Council and the Parliament in June 2017 ‘on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities’.<sup>50</sup> The report focuses more on preventive administrative measures to trace and tackle



money laundering and utilizes economic arguments with regard to them, whilst it seems that repressive criminal law measures are justified with securitization. Administrative measures appear to require less severe justification grounds, whereas harmonization of criminal law measures is grounded in the severe, threatening and cross-border nature of criminality. This is logical, since criminal law requires the strongest legitimating arguments, but the arguments should also be based on factual evidence. The situation seems a bit contradictory, however; criminalization is justified more strongly with terrorism even though terrorist funding can be more effectively tackled with preventive rather than repressive measures.

The European Parliament and the Council made some amendments in the original proposal, but the securitizing rhetoric remained in the Recitals and the Directive was approved with a clear majority; still, some criticism exists. In June 2017, the Council had reached a general approach with reservations from Germany and Greece,<sup>51</sup> and agreed on its final position on 8 June 2018. On 11 September 2018, the European Parliament approved the resolution by 634 votes for, 46 against and 24 abstentions. Before the adoption by the Council, on 5 October 2018, the Czech Republic, Greece, Slovenia and Germany issued a declaration on the new Directive and especially criticized the parts that obligate the Member States to press criminal charges against a person that has obtained money from acts that may be *legal* in the country where the predicate offence was made.<sup>52</sup> They stated that double criminality, that is, the requirement that predicate offence is criminalized both in the country where it took place and where money laundering is committed, is necessary. In other words, they consider that the proposal is inconsistent with the principle of *nulla poena sine lege*, banning punishment for acts not prescribed in law. Despite the letter, in the Council vote on 11 October 2018, all votes were in favour, except for Slovenia's and Germany, which respectively abstained and voted against the Directive. Therefore, the Czech Republic and Greece finally voted in favour of the Directive and the opposition of

Germany and Slovenia did not matter, as the Directive was approved through qualified majority voting, and these countries will be bound by it. In the Finnish legislative documents, discussed in the following section, it was also directly stated that the legislation would pass regardless of Finnish objection, so the Finnish Government rather decided to aim for a compromise. Interestingly, no country considered that the conflict with national criminal law was severe enough to launch the 'Emergency Brake' procedure provided for in the Lisbon Treaty; it may have been primarily a symbolical matter for Germany to vote against the Directive.

In the next section, we discuss the case of Finland to illustrate that the securitization seems not to have succeeded in all countries. As discussed below, in the latest review of the Ministry of Justice, money laundering does not seem to be connected to terrorism in Finland but, despite this, self-laundering will likely be more comprehensively criminalized in order to meet the level of criminalization of other Member States. The Finnish case suggests that the pressure coming from the EU and international organizations is enough to agree to compromising national criminal law traditions. However, since the Finnish understanding of the object of legal protection in money laundering is based on the legal economy rather than on protection from terrorism, this may cause problems for the application of the legislation.

#### 7. Stage 5: Policy output in Finland – Resistance to the securitization logic

The policy output of the legislative process is the anti-money laundering Directive, but we do not yet know how the Directive is incorporated in the legislation of each specific country. A point of interest is how a previously strenuous opponent to the criminalization of self-laundering, Finland, is willing to compromise its traditional understanding of fundamental principles of criminal law under EU pressure, even though the Finnish approach is sceptical of the conflation of terrorist funding and money laundering in Finland. This suggests that securitization can be superfluous vis-à-

vis national representatives, but perhaps it is more intended for the general public in order for them to support, or at least approve of, such legislation at the EU level.

Without going into further detail about country-specific differences, it suffices to note that there is divergence in whether EU countries have explicitly criminalized self-laundering or whether there is *not* a specific rule on the non-punishability of self-laundering, which means that self-laundering is punishable.<sup>53</sup> In Finland, self-laundering is currently punishable only in cases of aggravated money laundering and if it constitutes a more planned and serious crime than the predicate offence, and perhaps due to this strict definition, no sentences have been imposed in Finland for self-laundering so far. In practice, the threshold to impose sentences for self-laundering is so high in Finland that the self-laundering provision has so far been a dead letter.

However, in addition to the EU, FATF has issued recommendations for Finland in order to criminalize self-laundering more extensively.<sup>54</sup>

It should be recalled that since the EU legislative instrument is a Directive (instead of a regulation), it does not require Member States to explicitly criminalize self-laundering as long as self-laundering is not declared non-punishable and is punished equally to third-party money laundering. Article 3(5) of the Directive states that 'Member States shall take the necessary measures to ensure that the conduct referred to in points (a) and (b) of paragraph 1 is punishable as a criminal offence when committed by persons who committed, or were involved in, the criminal activity from which the property was derived'. When compared to third-party money laundering, self-laundering thus only excludes 'the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity'. One reason might be that a separate punishment for merely possessing something a person just stole, for example, could potentially violate the *ne bis in idem* principle of punishing twice for the same act, at least in a situation in which the sentences for the theft and the self-laundering were exceptionally imposed in two different criminal procedures. In the following, we

examine how Finland too becomes ready to extend the criminalization of self-laundering obligated by the Directive.

The Finnish Government has to submit so-called U letters to inform the Parliament on issues related to the EU. On 26 January 2017, the Government issued a letter on the Commission's anti-money laundering proposal with a memo from the Ministry of Justice. Overall, the document presents a positive approach towards the Directive.<sup>55</sup> The first paragraph of the position of the Government reads: 'In principle, the Government has a positive approach towards the aims of the directive proposal. The Government generally supports measures in order to tackle money laundering and terrorist financing'.<sup>56</sup> This was the only mention of the connection between money laundering and terrorism in any documents before and after the approval of the Directive. The Government thus nominally approved the link between money laundering and terrorism, but also pointed out that the proposed obligations are more extensive than international standards and Finnish legislation, and it has to be considered whether one wants to extend the punishability of or criminalize self-laundering in a more comprehensive manner, because it may be problematic, for example, with regard to legal concurrence. Even though the Government approved of the Commission's rhetoric on justifying the Directive with tackling terrorist funding, the MPs and legal experts were more critical, as we discuss below.

The Legal Affairs Committee of the Parliament provided a statement on the U letter, and it was concerned over the criminalization of self-laundering. It even brought up the Treaty-based Emergency Brake procedure referred to above, but considered that Finland should rather aim at reaching a compromise in the Council. Furthermore, the Committee considered it problematic to present the aims of the Directive as only tackling terrorist financing, since the scope of the Directive's application is more extensive.<sup>57</sup> The questionable connection of terrorism and money laundering in Finland was also brought up in an expert statement to the Government by the Finnish Bar Association, stating that

‘In Finland, money laundering is hardly related to financing terrorist organizations or serious organized crime, but rather to economic profit gained from narcotic sales and traditional economic criminality’.<sup>58</sup> Terrorism was thus not considered to constitute a justification for extending the criminalization of money laundering.

The Government issued a follow-up letter to the Parliament on 24 May 2017. It also included a memo from the Ministry of Justice, as well as an EU Council proposal for a compromise in an upcoming meeting. The document repeats the statement of the previous memo quoted above, but the relation between money laundering and terrorist financing is not discussed. It is stated that Finland would still have wanted to limit the extent of self-laundering criminalization, but ‘a significant majority of the member states, however, support comprehensive criminalization obligation concerning self-laundering’.<sup>59</sup> However, the Finnish Government deems that the self-laundering provision can be interpreted to only apply to acts that are more blameworthy than the predicate offence, an interpretation supported by a Recital included in the Council’s general approach.

Finland eventually voted in favour of the Directive in the Council. Terrorism, however, did not constitute the reason why Finland decided to approve the proposed Directive, but it was rather the acknowledgement of the fact that other countries supported it. It thus seems that a Member State, in this case Finland, might be more prone to compromises when regulating cross-border crime in observance to international standards, even though the securitizing rhetoric may not correspond to the everyday reality and the legal praxis in that specific country.

After the Directive was approved on 2 December 2018, the Finnish Ministry of Justice established a committee to draft a proposal on the implementation of the Directive in the Finnish Criminal Code.<sup>60</sup> Interestingly, the Committee Report does not at all discuss terrorism as a justification for the criminalization of money laundering but states that ‘money laundering poses a threat to the legal economy, which the criminalization aims

at protecting'.<sup>61</sup> Another interpretation of the purpose of the Directive was included in an attached dissenting opinion, according to which the purpose of the Directive is 'to protect the confidence, stability and reputation of the financial industry in the internal market of the Union from the damage that money laundering and related criminality cause'.<sup>62</sup> The dissenting opinion of the Office of the Prosecutor General deems that self-laundering should be criminalized more comprehensively than in fulfilment of the minimum requirements set out by the Directive, and one of the motivations for this is the fact that the object of protection of money laundering is the preservation of confidence in the financial system, which is thus different from the object of protection of the predicate offence. It is noteworthy that the report as well as all statements except one do not mention any other objective of the Directive than the protection of the financial system. Only the Office of the Chancellor of Justice pointed out that the objects of legal protection mentioned in the Directive (stability and reputation of the financial system and internal security, including preventing terrorist financing) are 'acceptable' from the perspective of the Finnish fundamental rights system.<sup>63</sup> As we can observe, the view of the Commission that the justification of the criminalization of money laundering is the protection of internal security from terrorism was not shared in Finland, where the criminalization of money laundering was considered to protect the legal economy and the financial system. The securitization rhetoric thus worked indirectly, since the other Member States seemed to approve of the Commission's proposal and Finland thus felt obliged to conform, even though the object of legal protection in Finland was not derived from terrorism. The situation is a bit absurd; where securitization is utilized at the EU level, the main reason to accept the Directive seemed to be that the other Member States had approved of it. The parallel use of securitizing rhetoric at EU level and the reliance on objects of legal protection at the national level may thus be a bit contradictory. If terrorism is not necessarily approved as a justificatory criterion for the criminalization of money laundering or self-

laundering in the Member States, the question remains as to whether this can be considered a case of just collective securitization.

8. Is this a case of just collective securitization?

As we have illustrated above, the terrorism justification of the EU-level securitization of money laundering is not necessarily shared at the national level, which is why the final question we ask is whether the securitization process can be considered just in light of the three criteria presented previously. The original three criteria include: (1) that there is an objective existential threat endangering the survival of an actor; (2) that the referent object is morally legitimate and conducive to human well-being; (3) that the security response is appropriate to the threat with regard to the capabilities of the aggressor and in terms of the sincerity of the securitizing actor.<sup>64</sup>

The existential threat that has recently been mentioned as the EU-level justification for the money laundering criminalization is terrorism. The Directive proposal starts with the statement ‘The recent terrorist attacks in the European Union and beyond, underline the need for the EU to work across all policies to prevent and fight terrorism’.<sup>65</sup> This seems difficult to deny. Terrorism is a handy threat to utilize in the securitization request, as in recent years terrorist organizations have visibly aimed at conducting more terrorist attacks and clearly have the means to do so. In accordance with the first criterion,<sup>66</sup> it can thus be stated that terrorism is an objective threat. This may explain why terrorism is utilized as a justification for the Directive; money laundering in itself does not threaten the survival of people and is thus not an effective threat to use in securitization. We need to remember, as reminded by Hülse in the context of money laundering, that ‘international regulators engage in “problematization”, because they will only succeed in persuading others of their rules if they have managed to persuade them of the existence of the problem these rules attempt to solve’.<sup>67</sup> Securitization with terrorism is an extreme form of such problematization.

We can also state that the second criterion of just securitization, the referent object mentioned in the Commission proposal, the ‘internal security of the EU and the safety of its citizens’,<sup>68</sup> indeed is a legitimate one. On the contrary, the traditional object of legal protection in money laundering, protection of the legal economy and the financial system, may not be so obvious to contribute to human well-being and is thus more difficult to use in securitization. The Directive proposal further emphasizes the conducted terrorist attacks in the EU and the need for the latter to fight terrorism together, which sounds plausible in light of the area of free movement in the EU. Of course, we can ask whether the money laundering Directive actually contributes to ensuring internal security and the safety of citizens, as the specific channels through which the contribution to security happens are not elaborated in the proposal.

This brings us to the final criterion, the appropriateness of the response. According to Rita Floyd’s original formulation, securitization should be appropriate to the threat and the securitizing actor must be sincere in its intentions.<sup>69</sup> The Directive proposal presents the link between terrorism and money laundering as follows: ‘Cutting off their sources of finance, making it harder for terrorists to escape detection when using these funds, and exploiting relevant information from financial transactions all make crucial contributions to the fight against terrorism and organized crime’.<sup>70</sup> However, these measures are not dependent on extended criminalization as such but on finding the funds used for terrorism, and terrorist financing has already been comprehensively criminalized. Terrorism financing can also derive from legal sources, in which case it cannot be punished based on the provisions on money laundering.<sup>71</sup> As we stated in the beginning, the criminalization of money laundering is not as helpful in case of terrorist ‘money dirtying’.

We are not able to analyse the sincerity of the Commission in the Directive proposal, but the response does *not* seem appropriate in terms of the threat. Is it really the case that through more comprehensively criminalizing money laundering the EU is better



equipped to tackling terrorism? It does sound doubtful to state that a criminal law provision such as a money laundering provision would be able to prevent terrorist attacks. Criminalizing money laundering more comprehensively may even act as a deterrent for economic or narcotics-related crime where the funds from money laundering often come from, but it seems unlikely that the criminalization of money laundering would ever prevent terrorist financing. For example, a FATF report on professional money laundering states that the project team examined links between money laundering and terrorist financing, but found that there was insufficient material for a separate section and that ‘the vast majority of cases submitted relate to money laundering, rather than terrorist financing’.<sup>72</sup> The project team only came across one case where money laundering was linked to terrorist financing. Thus, it may be problematic to frame the criminalization of money laundering in terms of preventing terrorist financing if no evidence of tracing terrorist funds through such criminalization is presented. Although not stated in the Directive proposal, one manner in which the criminalization of money laundering could help prevent terrorist financing would be the authority provided by extensive penal regulation to intervene more effectively in suspect flows of money; in other words, preventive regulation is complemented with extensive repressive regulation, which may provide one justification for the legislation. On a balance of the above arguments, however, justifying the criminalization of money laundering with terrorism cannot be considered just securitization, as it does not fulfil the criteria of appropriate response.

If, in contrast, the argumentation would have relied on money laundering posing a threat to the legal economy, more extensive criminalization of money laundering could be seen as an appropriate response. The problem, however, seems to be that such claim may not be convincing enough to argue for the necessity of such criminalization. Indeed, money laundering does not endanger the entire existence of the legal economy and financial system. Securitization would thus not have been just either if the

traditional arguments relying on the objects of legal protection would have been utilized. Nevertheless, the utilization of the objects of legal protection as the basis of EU-level criminalization would pose less issues in the national application of such legislation, as a shared understanding of the object of legal protection would make it easier to assess whether a separate punishment should be imposed for self-laundering. As outlined earlier, according to the Finnish criminal law praxis, it seems that self-laundering could be separately punished only if the object of legal protection of the predicate offence was different from the object of legal protection of the self-laundering offence.

#### Conclusion

In this article, we have shown how the threat of terrorism has been utilized at the EU level in order to justify the criminalization of money laundering in a more harmonized and comprehensive manner, which may compromise fundamental principles of the criminal law systems of the Member States. It is perfectly legitimate to fight terrorism and to promote further integration, but not at any cost. We argue that the money laundering Directive discussed in this contribution will not primarily result in disclosing terrorist activities. Instead, it may pave the way for further compromising fundamental criminal law principles if the threat is deemed serious enough.

It can thus be considered positive that the securitizing rhetoric is not always internalized. However, despite not considering money laundering as being linked to terrorism, even Finland was willing to compromise its position on self-laundering due to other Member States being in favour of extending its criminalization. The harmonization of a criminal law provisions may appear a minor issue, but it should be noted that such harmonization may simultaneously lead to Member States harmonizing the general principles of criminal law and country-specific traditions, such as legal concurrence (whether different acts included in the same offence are punished separately or not). In this manner, harmonization in one criminal law provision may

spill over into the harmonization of general principles of national criminal law, possibly altering national legal systems fundamentally.<sup>73</sup>

To conclude, pressure for further harmonization in criminal law can be considered problematic if it is not based on a shared view of the object of protection, such as in the case of money laundering. Whereas it is often contended in Finland that money laundering threatens the legal economy, the Commission justifies money laundering as primarily linked to terrorist financing. It thus seems problematic to use securitizing rhetoric, which confuses the national understandings of objects of legal protection and may cause problems, for example, in legal concurrence. Perhaps the securitizing rhetoric's intended purpose is for the public to accept such supranational legislation. We should not forget that collective securitization may seek to exploit existing threats for new purposes, which can, in turn, cause issues for national criminal law systems.

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#### Notes

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